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FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/11

SPONSOR Keller LAST UPDATED HB

SHORT TITLE AG Enforcement of Securities Fraud SB 18

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY11 | FY12 | FY13 | 3 Year Total Cost | Recurring or Non-Rec | Fund Affected |
|--------------|------|------|------|----------------------|-------------------------|------------------|
| Total | NFI* | NFI* | NFI* | | | |

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 State Investment Council (SIC)
 Public Employees Retirement Association (PERA)
 Regulation and Licensing Department (RLD)
 State Treasurer’s Office (STO)

SUMMARY

Synopsis of Bill

Senate Bill 18 amends sections of the New Mexico Uniform Securities Act (“Act”) to:

1. Clarify the definitions of “fraud”, “deceit” and “scienter” to make the definitions consistent with the New Mexico cases under the prior Act and consistent with section 508 of the Act (removing the element of specific intent);
2. Authorizes the Attorney General to institute criminal proceedings under the Act without obtaining a letter of declination from the appropriate district attorney prior to instituting the proceeding;
3. Provides specific authority to the Attorney General under the Act to enforce the Act civilly and cooperate with foreign jurisdictions in investigations of securities laws violations;
4. Authorizes the Attorney General to conduct public or private investigations under the Act;

5. Increases the statute of limitations for civil liability under the Act from two to four years from date of discovery or after discovery should have been made by the exercise of reasonable diligence and from five to ten years after the act or transaction constituting the violation;
6. Specifies an effective date of July 1, 2011; and
7. Changes the form of citations of cross-references within the Act.

FISCAL IMPLICATIONS

The AGO notes that if the bill authorized the AGO to negotiate contingency fee agreements with outside counsel to enforce the Act, there would be no fiscal implications for this agency.

SIGNIFICANT ISSUES

Permitting an agency to enter into contingency fees contracts for litigation services, as the AGO proposes throughout its analysis, presents the risk of abuse through law firm selection or case selection (or non-selection) involving “pay to play” schemes involving favorable settlement terms. There would also be opportunities for frivolous lawsuits against political targets.

There is a clear need for both transparency and strong oversight to avoid the above and other risks from having this method of litigation available. Including language in the bill to specify that procurement of services in this way be subject to the represented agency’s review and approval, along with concurrent approval by an outside entity such as the Department of Finance and Administration’s Contracts Review Bureau or the State Purchasing Agent might help insure that this procurement method is only being used for appropriate cases and to maximize possible returns to the state.

The AGO suggests that the removal of the scienter/specific intent requirement could result in more findings of liability under the Act, leading to recoveries in a larger number of cases.

The RLD points out these issues:

1. The proposed amendments to the Act would expressly provide concurrent jurisdiction by the Director of the Securities Division of RLD (“the Director”) and the Attorney General (“AG”) with regard to significant portions of the Act. That concurrent jurisdiction will likely require coordination between these two agencies to avoid duplication, confusion, and could result in the parties working at cross-purposes as a result of different goals or agendas.
2. Subsection J in Section 3 authorizes the AG to institute criminal proceedings under the Act without obtaining a letter of declination from the appropriate district attorney prior to instituting those proceedings, which is a departure from existing law, which requires such a letter of declination in other criminal prosecutions.
3. The AG already has authority to engage in investigations in connection with both civil and criminal matters. Given that authority, it is not clear why existing law that authorizes these actions by the Director to conduct public and private investigations for purposes of rule-making and other administrative enforcement activities, needs to be amended, as proposed in Subsection A of Section 5, to grant the AG that same authority, since the AG has no administrative or rule-making powers in this area.

4. The amendments in Section 7 authorize the Director or the AG to work with other states, foreign jurisdictions, and regulatory agencies to effectuate greater uniformity in securities matters among federal government, self-regulatory organizations, states and foreign governments. This does not appear to be substantive material within the expertise of the AG. Additionally, the coordination concerns described in comment 1 would appear to apply to these amendments.

PERFORMANCE IMPLICATIONS

The AGO notes that if the bill authorized the AGO to negotiate contingency fee agreements with outside counsel to enforce the Act, there would be no performance implications for this agency. The RLD notes that coordinating efforts with the AG may require additional time and resources.

ADMINISTRATIVE IMPLICATIONS

The AGO notes that if the bill authorized the AGO to negotiate contingency fee agreements with outside counsel to enforce the Act, there would be no performance implications for this agency. The RLD notes that coordinating efforts with the AG may require additional time and resources.

OTHER SUBSTANTIVE ISSUES

SIC notes that this bill has been compared to the Martin Act in New York, which has been used not only to prosecute fraud criminally, but also as a powerful tool to recover both punitive and actual losses related to investment fraud or improprieties in that state's pensions and on Wall Street. These recoveries and legal penalties have amounted to more than \$150 million dollars in recovery and penalties to date, and by themselves—even without criminal prosecution—send a strong message to investment firms and individuals who might be tempted to bend or break the rules for profit. Although this bill may not be a carbon copy of the Martin Act, the removal of the scienter/specific intent requirement that is proposed in Section 2 is a core strength of the Martin Act.

RLD cites some other differences between the Act and the proposed amendments and the Martin Act: Unlike New Mexico, New York has no Securities Director overseeing state securities regulations, so the New York Attorney General is the primary regulator of that state's securities law. Also, the New Mexico Act already affords certain types of enforcement and protections to investors in New Mexico that are not available under the Martin Act, such as a private cause of action by investors victimized by violations of the New Mexico Act.

AMENDMENTS

Based on the AGO's comments in Fiscal Implications, Performance Implications and Administrative Implications, an amendment authorizing the AGO to negotiate contingency fee agreements with outside counsel to enforce the Act may be appropriate to consider.

MD/svb